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Articles

DEATH BY DISCOVERY, DELAY, AND DISEMPOWERMENT: LEGAL AUTHORITY FOR ARBITRATORS TO PROVIDE A COST-EFFECTIVE AND EXPEDITIOUS PROCESS

Tracey B. Frisch [a1]

Whether warranted or not, despite statistics to the contrary, [1] arbitration in recent years has become a punching bag for criticism that it has begun to mirror the type of scorched earth discovery practices and delays seen in litigation. Why is this? Is it because parties are not actively participating in the arbitration process and instead have allowed their outside counsels to use the litigation-style discovery and delay tactics with which counsel feel most comfortable? Maybe. Do parties themselves want protracted discovery and a drawn out arbitration process? Some, perhaps. Has arbitration become a victim of its own success, attracting more bet-the company-claims that demand a process reflecting the magnitude of those claims? It's possible. What role, if any, do arbitrators play in ensuring that the arbitration process does not fall victim to death by discovery, delay, and arbitrator disempowerment? A pivotal role. This article outlines why arbitrators should feel empowered to take an active role in managing the arbitration process -- be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process -- and it provides guidance as to how arbitrators can manage the arbitration process without feeling concerned that their award will be in danger of vacatur.

***156** The Federal Arbitration Act ("FAA") lists as grounds for vacatur under Section 10(a)(3) failure to hear pertinent and material evidence, refusal to postpone a hearing, and other arbitrators' misbehavior prejudicing the rights of any party. [2] Arbitrators, however, do not need to live in fear that their awards will be vacated under FAA 10(a)(3). While arbitrators do need to be aware of the limits of their authority, courts around the country generally defer to the arbitrators' discretion in this context. Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration -- no informed arbitrator should shy away from their responsibility for fear of jeopardizing the award.

I. ARBITRATORS CAN REFUSE TO HEAR EVIDENCE AND DENY DISCOVERY REQUESTS SO LONG AS PARTIES ARE PROVIDED A FUNDAMENTALLY FAIR HEARING

Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing. The court's analysis is performed on a case-by-case basis with wide discretion given to the arbitrator. The fundamentally fair hearing standard used to determine whether arbitrators have misconducted themselves by refusing to hear pertinent and material evidence under Section 10(a)(3) has been adopted by the Eleventh, Sixth, Fifth, and Second Circuits. The following cases highlight where courts draw the line between a fundamentally fair and unfair hearing. For instance, did the arbitrator exceed her authority pursuant to the parties' arbitration clause, and if so, did the erroneous determination cause prejudice to a party.

***157** In *Rosenweig v. Morgan Stanley*, the Eleventh Circuit confirmed an arbitral award against Morgan Stanley finding that the arbitrators' refusal to allow Morgan Stanley additional cross-examination of Rosenweig, its former employee, did not

amount to misconduct. [3] The arbitrators did not explain their reasons for denying the additional cross-examination. However, the court determined that the evidence from additional cross-examination, concerning a client list contained in disks produced by Rosenweig, would have been cumulative and immaterial, and for this reason, Morgan Stanley was not deprived of a fair hearing. [4]

The Sixth Circuit ruled similarly in *Nationwide Mutual Insurance Co. v. Home Insurance Co.* [5] In *Nationwide Mutual Insurance Co.*, the Court confirmed the arbitral award where the reinsurer argued that the panel was guilty of misconduct because the panel's damages decision was based on spreadsheets prepared by the insurer without allegedly allowing the reinsurer to conduct discovery as to the adequacy of the insurer's cost estimates. The Sixth Circuit stated:
'Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.' [*Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 WL 178554, at *6 (6th Cir. Feb. 8, 2000).] Because [the reinsurer] received copies of [the insurer's] submissions on the costs it incurred in defending against rescission, and the arbitration panel gave [the reinsurer] an opportunity to respond to these submissions, it is not clear what purpose discovery or a hearing on this issue would have served. [6]

Thus, the *Nationwide Mutual Insurance Co.* Court held that "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing" and found that the parties had not been denied a fundamentally fair hearing. [7]

The rationale behind the fundamentally fair hearing standard has been defined by the Fifth Circuit. [8] In *Prestige Ford v. Ford* ***158** *Dealer Computer Services, Inc.*, the Court confirmed the arbitral award when the arbitrators denied motions to compel discovery. [9] In its opinion, the Court explained that "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the disputes an adequate opportunity to present its evidence and arguments." [10] The arbitrators had not denied the parties a fair hearing when they held hearings on motions to compel discovery and denied them. The Court concluded that "submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him." [11]

Courts have also examined arbitral rulings alleged to exclude material and pertinent evidence, which the losing party argues had a prejudicial effect. [12] In *LJL 33rd Street Associates, LLC v. Pitcairn Property Inc.*, the Second Circuit Court of Appeals confirmed the award in part over the losing party's argument that the arbitrator excluded hearsay documents that should have been considered. [13] The Court explained that the evidence the arbitrator excluded was all hearsay, and that while arbitrators are not bound with strict evidentiary rules, they are not prohibited from excluding hearsay documents. [14] Furthermore, the Court stated that the arbitrator gave the party the opportunity to eliminate the hearsay by bringing in the makers of the documents to the arbitration hearing. There was thus no prejudice to the party. For this reason, and based upon the Court's deference to arbitrators' evidentiary decisions, ***159** the Court held that the parties were not denied a fundamentally fair hearing. [15]

District courts have also adopted the fundamentally fair hearing standard. [16] In *A.H. Robins Co., Inc. v. Dalkon Shield*, the Court confirmed the arbitral award, finding that the arbitrator's decision to exclude evidence of defect in the product at issue was not an abuse of their discretion, and even if it was, the exclusion of evidence did not deprive the claimants of a fundamentally fair hearing. [17] To determine whether Section 10(a)(3) of the FAA had been violated, the court used a two-pronged test. First, the claimant had to show "that the arbitrator's evidentiary ruling was erroneous." [18] Second, the claimant had to show "that the error deprived the movant of a fundamentally fair hearing." [19] The Court determined that the arbitrator's evidentiary rulings

were not erroneous and that even if the court found that the arbitrator's evidentiary rulings were erroneous, the movants did not show that they were denied a fundamentally fair hearing.[20] Furthermore, the *Dalkon Shield* Court expressed concern that a court's review of arbitral awards should be limited because "an overly expansive review of such decisions would undermine the efficiencies which arbitration seeks to achieve."[21]

Many district courts have applied a similarly limited review of arbitral awards challenged under Section 10(a)(3).[22] The Southern ***160** District of New York held that an arbitrator's refusal to hear or to admit evidence alone does not constitute misconduct; it only constitutes misconduct when it amounts to a denial of fundamental fairness.[23] For instance, in *Areca, Inc. v. Oppenheimer and Palli Hulton Associates*, the Court denied the motion to vacate based on petitioner's argument that the arbitrators erroneously refused to allow the petitioner to present the testimony of the brokerage firm's CFO.[24] However, the Court noted that "petitioners presented their direct case over seven full hearing days, in which they called ten witnesses, including four present and former [ ] employees and three experts, and introduced over 148 exhibits into evidence."[25] Therefore, "[t]he scope of inquiry afforded [to] petitioners was certainly sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing."[26] The Court further stated that the arbitrators' broad discretion to decide whether to hear evidence needed to be respected and that arbitrators needed not to compromise their hearing of relevant evidence with arbitration's need for speed and efficiency.[27]

Certain state courts have also confirmed awards despite parties' allegations that arbitrators refused to hear or admit evidence.[28] Similar to their federal counterparts, the courts focused not only on the arbitrators' alleged error, but also on the alleged prejudice suffered by the claimant from this alleged error. For instance, in *Hicks III v. UBS Financial Services, Inc.*, a Utah appellate ***161** court reversed the lower court and confirmed an arbitral award in which the movant sought to vacate the arbitration award based on what it contended were erroneous discovery decisions that substantially prejudiced its rights to participate fully in the arbitration.[29] Namely, the movant based its motion to vacate on the arbitrator's alleged denial of its ability to cross-examine a witness and denial of certain deposition requests.[30] While the case focused on FINRA rules, the Court held:
[A]n arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party. . . . At a minimum, a discovery decision must be sufficiently egregious that the district court is able to identify specifically what the injustice is and how the injustice can be remedied.[31]

In this case, the movant presented no record of the arbitration proceeding itself and instead sought vacatur of the award based on an insinuation that a piece of evidence presented by the opposing party was false.[32] The Court held that credibility determinations are exclusively within the province of the arbitration panel and nothing movant presented identified any specific information he was denied or precluded from presenting.[33] Therefore, the court held that movant failed to show that the arbitration panel's discovery decisions substantially prejudiced his rights to present his case fairly.[34]

Not surprisingly, these state courts' views are similar to the federal courts' interpretations of the standard for a violation of Section 10(a)(3). Because evidentiary rulings are procedural in nature, courts rightfully defer to arbitrators' decisions on evidentiary issues so long as these decisions do not rob the parties of a fundamentally fair hearing. While courts will vacate awards at the extremes, generally arbitrators are generally granted the wide discretion that they need to provide for an expeditious and cost-effective process.

*162 II. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO HEAR PERTINENT AND MATERIAL EVIDENCE/DENIAL OF DISCOVERY REQUEST DEPRIVES A PARTY OF A FUNDAMENTALLY FAIR HEARING

The Fourth and Second Circuits, applying the fundamentally fair hearing standard, have vacated arbitral awards on the ground that the arbitrators denied the parties a fundamentally fair hearing. [35]

In *International Union, United Mine Workers of America v. Marrowbone Development Co.*, the Fourth Circuit vacated an award because the arbitrator had denied the parties a fair hearing. [36] The arbitrator reached a decision without holding a hearing. [37] First, the Court explained that the arbitrator's making of the award without an evidentiary hearing conflicted with the parties' agreement to arbitrate, which required the arbitrator to hold a hearing. Indeed, the parties' agreement stated that the arbitrator had to "conduct a hearing in order to hear testimony, receive evidence and consider arguments." [38] Second, the Court explained that while "an arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present," the Court could not condone an arbitrator's decision to both go against the parties' agreement and to deny them a full and fair hearing. [39]

In *Tempo Shain Corp. v. Bertek, Inc.*, the Second Circuit vacated an arbitral award on the ground that the arbitrators' conduct in denying the testimony of one of the parties' officers deprived the party of a fundamentally fair arbitration. [40] The claims in arbitration were based on whether the parties were fraudulently induced to enter into a contract. The witness at issue was Bertek's former president who was intimately involved in the contract negotiations ***163** and allegedly was the only person who could testify about certain aspects of the negotiations. The witness became temporarily unavailable to testify after his wife was diagnosed with a reoccurrence of cancer. [41] Bertek asked the arbitrators to keep "the record open until [the witness] could testify." [42] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. [43] The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. [44] While the *Tempo Shain Corp.* Court recognized that "undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution," the Court found that:
[B]ecause [the witness] as sole negotiator for Bertek was the only person who could have testified in rebuttal of appellees' fraudulent inducement claim, and the documentary evidence did not adequately address such testimony, there was no reasonable basis for the arbitrators to conclude that [the witnesses] testimony would have been cumulative with respect to those issues. [45]

Similarly, district courts in the Second and Ninth Circuits have vacated awards on the grounds that the arbitrators denied the parties a fair hearing when they refused to hear material and pertinent evidence. [46] In *Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO*, the Court vacated the award because the arbitrator refused to consider testimony based on rules of evidence without first notifying the parties and counsel that the rules of evidence would apply. [47] The arbitrator's opinion stated that he disregarded a witness's rebuttal testimony because it should have been presented as part of the principal case and was not timely. [48] However, no evidentiary rules were announced prior to the hearing by the arbitrator and no such rules were included in the parties' arbitration agreement. [49] Thus, the Court found that the arbitrator's decision to ignore the testimony provided by the petitioner's rebuttal ***164** witness amounted to a fundamentally unfair hearing. [50] The Court held that the rules of evidence did not apply to an arbitral proceeding and by denying evidence to be heard on that basis alone without warning the parties as to what rules the arbitrator would be applying, the arbitrator denied the petitioner a fundamentally fair hearing. [51]

State courts have also vacated awards pursuant to Section 10(a)(3) when arbitrators refused to hear evidence that the court found to be material and pertinent. [52] In *Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police*

Patrolmen's Association, IUPA No. 16807, after the evidentiary hearing took place, the arbitrator set a date for the parties' post-hearing briefs to be due.[53] Prior to the due date for the post-hearing briefs, the employer filed a motion for leave to file supplementary evidence of warnings given to the employee that justified the employer issuing a five-day suspension. The arbitrator denied the employer's motion and refused to accept the supplementary evidence. The arbitrator based his denial on the fact that the evidentiary record was closed as of the conclusion of the evidentiary hearing. The arbitrator's award found that the employer was not justified in issuing the five-day suspension. The Massachusetts Court of Appeals vacated the award on the ground that the arbitrator did not have the authority under the American Arbitration Association rules adopted by the parties to declare the evidentiary record closed prior to the due date for the post-hearing briefs.[54] The Court found the following:
[A]lthough decisions concerning excluding or admitting evidence are generally within an arbitrator's discretion, the arbitrator did not have the authority under the American Arbitration Association rules to declare that the hearing was closed before the briefs were filed, or to exclude evidence on that basis. As a result, the arbitrator's justification for excluding the evidence -- that the hearing was closed -- was not within his authority to determine, ***165** particularly when he never made a determination concerning the materiality or reliability of the evidence.[55]

The Court further found that the evidence excluded was material and the exclusion prejudiced the rights of the employer.[56]

An overarching theme in all of these cases is that courts show deference to arbitrators' evidentiary decisions. However, given that arbitration is a creature of contract, it is important that an arbitrator stay within the confines of the parties' agreement. For example, if the clause provides that each party take two depositions, then the arbitrator should not deny a party two depositions. Beyond that, courts should view evidentiary matters as procedural and thus leave them to the wide discretion of the arbitrator. Courts that substitute their own reasoning and vacate awards simply because they disagree with the arbitrators' evidentiary rulings risk going beyond the confines of 10(a)(3) and being reversed. If arbitration is to live up to its promise as an efficient and cost-effective alternative to litigation, courts need to continue to provide deference to arbitrators' evidentiary rulings.

III. COURTS DEFER TO ARBITRATORS' DISCRETION IN THEIR DECISION TO GRANT OR DENY ADJOURNMENTS

Even though FAA 10(a)(3) provides that awards may be vacated based on an arbitrator's refusal to postpone the hearing upon sufficient cause shown -- as with evidentiary rulings -- granting or denying requests for adjournments are generally considered procedural matters and thus courts grant arbitrators broad discretion in such determinations. This makes sense given that the arbitrator, not a reviewing court, is closest to the matter at the time when the request for adjournment is being sought. Requests for adjournments can derail an otherwise efficient arbitration. Unlike in the context of litigation where matters in court are often adjourned without protest, the granting of an adjournment in arbitration should be the exception rather than the rule. Not surprisingly, the Second and the Sixth Circuits, as well as several district courts, have held that arbitrators' refusal to postpone hearings did not negate ***166** a fundamentally fair hearing or amount to an abuse of the arbitrator's discretion.[57]

Courts have confirmed the awards submitted to them when arbitrators have denied adjournment requests in the arbitral proceedings. For instance, in *Alexander Julian Inc. v. Mimco, Inc.*, the Second Circuit determined that granting an adjournment falls within the arbitrator's broad discretion.[58] In *Mimco*, the Court held that the arbitrators' denial of an adjournment request made by a party because his counsel had to be in federal court did not deprive the party of a fundamentally fair hearing.[59] The Court had two bases for its decision. First, the Court explained that the arbitrators had “at least a barely colorable justification” for denying the adjournment.[60] Second, the Court reiterated the *Tempo Shain* rule and held that “the granting or denying of an adjournment falls within the broad discretion of appointed arbitrators.”[61] Thus, this decision illustrates courts' deference to the arbitrators' procedural decisions.

Other courts have held that when arbitrators have a reasonable basis and justification for the adjournment refusal, courts should defer to the arbitrators' decision. [62] For example, in *Bisnoff v. King*, the Southern District of New York deferred to the arbitrators' decision in refusing to postpone a hearing. [63] There, the arbitrators denied a party's request to postpone a hearing, even though the party asked for this postponement on the grounds of sickness. [64] The arbitrators clearly and reasonably justified their denial in a letter to the party explaining that they believed that the party was capable of participating in hearings. [65] The Court deferred to this ***167** decision for two reasons. First, the Court held that the arbitrators had clearly and reasonably justified their denial. Second, the Court stated that it was "not empowered to second guess the arbitrators' assessment of credibility." [66] The *Bisnoff* Court distinguished this case from *Tempo Shain*. In *Tempo Shain*, the Second Circuit had not deferred to the arbitrators' decision to refuse to hear a witness's testimony. There, Bertek, a manufacturing company planned on calling a crucial witness for its case. Bertek asked for the arbitrators to keep "the record open until [the witness] could testify." [67] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. In *Bisnoff*, the situation was different because the arbitrators provided reasons for their decision. Thus, the standard of review remains deferential to the arbitrators' decision. Courts will defer to arbitrators' procedural decisions so long as the arbitrators have provided a reasonable basis for their choices. [68]

The Sixth Circuit has shown even greater deference to the arbitrators' procedural decisions, such as granting or refusing an adjournment request. [69] *In re Time Construction, Inc. v. Time Construction Inc.*, the Court confirmed the arbitral award and held that the arbitration panel's refusal to postpone a hearing requested on the ground of the illness of a partner in a partnership was not an abuse of discretion. [70] In this case, the arbitration involved a construction dispute between a construction company and a partnership. The partnership moved to vacate the award entered in favor of the construction company on the ground that the panel abused its discretion in denying the adjournment request asked for because of a partner's sickness. [71] The Sixth Circuit reviewed the case under Michigan Court Rules 3.602(j)(1)(d) (similar to FAA 10(a)(3)) and it stated that "the party seeking to vacate the arbitration award carried the burden of proving by 'clear and convincing evidence' that the arbitrators abused their discretion." [72] Furthermore, the Court stated that, within the arbitration, it was the burden of party seeking the adjournment to provide the information ***168** necessary for the arbitrator to grant the adjournment. [73] The Court thus reviewed the procedural facts and observed that the arbitrators had "been generous in granting [the partnership] continuances and . . . adjournments throughout the two and a half years of the arbitration." [74] In light of these facts, the Court confirmed the award.

Courts have specified that so long as the parties had a full opportunity to present their cases, the arbitrator's denial does not amount to a violation of the fundamentally fair hearing standard. [75] Courts have also relied on the principle that so long as arbitrators provide the parties an adequate opportunity to present their evidence and argument, they are not bound by formal rules of procedure and evidence. [76]

Finally, courts have decided that arbitrators who act within the authority granted to them by the rules of the arbitration have not denied a fundamentally fair hearing to the parties. [77] For example, in *Verve Communications Pvt. Ltd v. Software International, Inc.*, the New Jersey District Court confirmed the arbitral award and held that an arbitrator had properly refused the party's request for a continuance of discovery as the arbitrator acted within the authority granted to him by the arbitration rules. [78] In this case, the arbitration agreement provided that the dispute be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association. [79] The party against whom the award was entered moved to vacate the award on the ground that the arbitrator wrongfully denied him the right to a subpoena to depose a non-party and submit a transcript of the deposition. The Court disagreed and stated that since the AAA Rules provided that "the tribunal may conduct the arbitration in whatever manner it considers ***169** appropriate, provided that the parties are treated with equality and that each party has the right to be heard is given a fair opportunity to present its case" and that the arbitrator "shall manage the exchange of information among the parties in advance of the hearing with a view to maintaining efficiency and economy," the arbitrator had sufficient authority to decide whether or not to extend discovery. [80] Furthermore, the Court observed that the party seeking to vacate the

award had the opportunity to present evidence and chose not to during the eight months that the arbitration lasted. [81] For these reasons, the arbitrator's choice not to continue discovery did not amount to misconduct under FAA 10(a)(3). [82]

As evidenced from the cases above, courts generally provide arbitrators with wide discretion when reviewing arbitrators' decisions regarding adjournment requests. However, courts will look to the arbitrator's reasoning to determine whether there was a reasonable basis or justification for denying a request for adjournment. Therefore, best practice dictates that arbitrators provide reasoning for their denial of an adjournment.

V. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO GRANT ADJOURNMENT AMOUNTS TO PREJUDICIAL MISCONDUCT

Courts have held that while the decision to grant or to deny adjournment requests is generally within the arbitrator's discretion, when the decision amounts to prejudicial misconduct the award must be vacated. [83]

The appellate division of the Supreme Court of New York has held that an arbitrator's refusal to grant a party's request for adjournment of an arbitration proceeding amounts to misconduct and justifies vacatur of the award when the party requesting the adjournment was not properly notified of the arbitration. [84] In *Wedbush Morgan Securities, Inc. v. Brandman*, a New York Stock Exchange arbitration, the Court granted the vacatur of the award because the arbitrators failed to provide due notice of arbitration ***170** to one of the parties. [85] The Court held that New York Civil Practice Law and Rules 7506[b] which mirrored New York Stock Exchange Rule 617 required arbitrators in New York Stock Exchange arbitrations to "notify the parties [of an upcoming arbitration hearing] in writing personally or by registered or certified mail not less than eight days before the hearing." [86] Failure by the arbitrators to do so and denial of an adjournment upon request by the improperly notified party amounted to prejudicial misconduct. [87] In *In re Arbitration between Leblon Consultants Ltd. and Jackson China, Inc.*, the Court also vacated the arbitral award on the ground that the arbitrator denied an adjournment request. [88] The Court remanded the case to the American Arbitration Association. [89] In this case, the respondent in the arbitration sought a hearing adjournment from the arbitrator in order to have the only employee who had knowledge of the dispute fly from England to New York and attend the arbitral hearing. In light of these facts, the Court found that the arbitrator had abused his discretion by refusing the adjournment. [90] Judge Silverman, dissenting in this opinion, stated that he would have confirmed the award. Based on the history of adjournments and delays in this arbitration, Judge Silverman considered that the arbitrator acted within his discretion. [91]

In *Pacilli v. Philips Appel & Walden, Inc.*, the Eastern District of Pennsylvania partially vacated the award on the ground that the arbitrators had refused to adjourn proceedings to allow a party that was rejoined the opportunity to cross-examine a witness concerning the cross claim against the rejoined party. [92] In this case, the Pacillis initiated a New York Stock Exchange arbitration against a brokerage firm for unauthorized transfer of funds, unauthorized securities transactions, and other claims. [93] The claimants named a series of respondents, including Mr. Engelhardt, the Compliance Director of the brokerage firm. A few days into the proceeding, Engelhardt reached a settlement agreement with the Pacillis and the claims against him were dismissed. [94] However, later in the proceeding, ***171** the claimant's expert witness testified as to Engelhardt's compliance obligations. [95] At this time, the arbitral panel decided to entertain cross claims from Engelhardt and the other respondents. The panel left a telephone message with Engelhardt's counsel inviting cross claims from Engelhardt. Within ten minutes of this phone call and before Engelhardt's counsel could respond, the arbitrators proceeded with the cross claims against Engelhardt with other defendants present. [96] Within forty minutes of the phone call, the arbitrators entertained cross-examination of the claimant's expert witness by another defendant, which was incriminating for Engelhardt. [97] Finally, the arbitrators entered an award against Engelhardt and other defendants. [98] The Court in this case vacated the award against Engelhardt on the ground

that the arbitrators denied him his right to a fair hearing. [99] Therefore, the arbitrators' decision not to wait for Engelhardt to appear, respond, and cross examine the expert witness amounted to misconduct on the part of the arbitrators.

These cases show that the while there is a presumption in favor of deferring to the arbitrator's discretion, unreasonable denials of adjournments will justify vacatur. These cases, however, involved situations in which arbitrators denied the parties' basic rights, such as the right to notice, the right to present a crucial witness, and the right to appear in the arbitration and cross-examine a witness. Thus, these cases do not undermine arbitrators' discretion; they only show that this discretion is to be construed within the broad boundaries of a fundamentally fair hearing. Given that the grounds for vacatur under 10(a)(3) are based on an arbitrator's procedural determination, courts rightly grant arbitrators wide discretion in these matters, vacating awards only at the extremes.

V. COURTS HAVE CONFIRMED AWARDS WHEN ARBITRATORS DECIDED THE CASE ON DISPOSITIVE MOTIONS

Federal courts have confirmed awards and deferred to the arbitrators' decision to render either an award on the merits or a motion to dismiss without holding a full evidentiary hearing. These ***172** decisions focus on whether the process in which the arbitrator engaged to reach her determination deprived the parties of a fundamentally fair hearing. The matter at issue must be ripe for summary disposition and the parties must be given the opportunity to submit argument on the issue.

In *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corporation*, the Southern District of New York confirmed an award that arbitrators made without holding in-person evidentiary hearings. [100] In this case, after the parties filed submissions and without holding a hearing, the arbitrator made a preliminary award in favor of Caltraport. The arbitrator then rendered his final award in favor of Caltraport, without holding any in-person hearings. InterCarbon, which had initiated the arbitration, moved to vacate the award on the grounds that the arbitrator was guilty of misconduct under FAA 10(a)(3) because he refused to hear evidence pertinent and material to the dispute. The Southern District of New York determined that InterCarbon had received a fundamentally fair hearing even though it was a "paper hearing." [101] To reach this decision, the Court applied the F.R.C.P. 56 standard (summary judgment) to determine whether the documents-only "hearing" was proper. [102] The Court determined that "the extent to which issues of fact were in dispute" determines whether the arbitrator should hold a live hearing. [103] In this arbitration, the circumstances were such that a summary disposition was fair. [104] Therefore, the arbitrator did not deny the parties a fundamentally fair hearing by considering only document submissions.

In *Warren v. Tacher*, the United States District Court for the Western District of Kentucky similarly refused to vacate an award on the ground that an arbitrator had decided to dismiss the case against certain respondents without permitting discovery. [105] In *Warren*, one of the respondents in an arbitration involving a broker-dealer transaction filed a motion to dismiss all claims against it at the outset of the arbitration. Petitioners filed a written response to this motion and the arbitration panel subsequently granted the respondent's motion to dismiss. After an arbitral award was rendered in petitioner's favor against the remaining respondents, petitioners ***173** moved to vacate the award in their favor on the ground that the arbitrator had granted one of the respondents' motion to dismiss prior to discovery and a full evidentiary hearing. The Court confirmed the award and held that petitioners failed to show that the arbitrator's decision denied them a fundamentally fair hearing. [106] Indeed, the Court noted that the arbitration panel entertained written submissions and a hearing on the motion to dismiss prior to granting the motion.

State courts have also deferred to arbitrators' granting dispositive motions and confirmed awards so long as parties were not denied a fundamentally fair hearing. [107] For instance, in *Pegasus Construction Corp. v. Turner Construction. Co.*, the Court of Appeals of Washington confirmed an arbitral award in which the arbitrator had decided that he could not award either party any damages because they did not comply with their contract. [108] In this arbitration, a subcontractor and a contractor on a construction project had a dispute. The subcontractor filed an arbitration demand under the AAA's Construction Industry

Arbitration Rules. The contractor then moved to dismiss the claims against him on the ground that the subcontractor had not complied with the dispute resolution provisions agreed to in the prime contract. After reviewing written submissions and holding oral arguments on the motion to dismiss, the arbitrator held that neither party had complied with the contract provisions. [109] Thus, the arbitrator awarded damages to neither party. The Court confirmed the award and held that a full hearing is not required when a dispositive issue makes it unnecessary. [110]

In *Schlessinger v. Rosenfeld, Meyer & Susman*, the California Court of Appeals confirmed an award even though the arbitrator resolved the principal issues presented to him by summary adjudications motions. [111] In this case, a law firm and a former partner in the law firm resorted to arbitration to determine the amount due to ***174** the former partner. [112] The parties agreed to arbitrate pursuant to AAA rules. [113] First, the parties cross-motioned for summary adjudication on the validity of the partnership agreement's penalty for competition. [114] The parties submitted written documents and the arbitrator held a hearing via telephone conference on the motion. The arbitrator then determined that the agreement was valid but that the reasonableness of the penalty would be examined after taking further evidence. [115] After engaging in discovery on that matter, the former partner filed a motion for summary adjudication contending that the penalty ("tolls") was unreasonable. Both parties submitted written submissions as well as declarations and depositions from relevant persons in the dispute (accountant, current law firm partners, former law firm partner). The arbitrator then conducted a telephone hearing on the motion. The arbitrator then ruled that the penalty was reasonable as a matter of law. [116] The arbitral award was then issued after the parties resolved the remaining issues by stipulation. The Court held that the former partner was not deprived of a fundamentally fair hearing because the arbitrator was allowed to rule on summary adjudication motions even if the AAA rules did not explicitly grant that power to the arbitrator. [117] The Court did, however, caution that its holding "should not be taken as an endorsement of motions for summary judgment or summary adjudication in the arbitration context." [118]

These cases indicate that arbitrators' granting dispositive motions will be upheld when the contract or the parties' agreement grants arbitrators such power and when decisions do not deprive the parties of a fundamentally fair hearing. [119] The permissibility of arbitrators to grant dispositive motions is supported by administrative rules such as the AAA Commercial Arbitration Rules ***175** amended and effective October 1, 2013, R-33. "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." [120] An arbitrator's authority to grant summary disposition motions is crucial to promoting the time and cost savings available in the arbitration process.

VI. SANCTIONS UNDER FAA 10 (A)(4)

One way for an arbitrator's ruling on discovery issues to have teeth is for the arbitrator to issue sanctions against a non-compliant party. Courts reviewing awards sanctioning a party for lack of good faith in the conduct of the arbitration or faulty document production have confirmed such awards. [121] The arbitrator must have the authority to award sanctions, be it granted by the parties' arbitration clause, applicable statute, or the parties themselves. Once the arbitrator determines that she has authority to award sanctions, one limit to the arbitrator's power is that the party owing sanctions must be a party to the arbitration agreement.

In *Reliastar Life Insurance Company of New York v. EMC National Life Co.*, the Second Circuit confirmed an award in which the arbitrator awarded attorney fees to the prevailing party. [122] In this case, the sanctioned party argued that the arbitrators had exceeded their powers and that the award should be vacated pursuant to FAA 10(a)(4). [123] The Court determined that it must evaluate whether the arbitrator had the power to award attorney's fees in the parties' agreement to arbitrate. [124] The Court held that the parties' arbitration agreement, which stated that parties should bear their own arbitration expenses, was sufficiently broad to confer ***176** on arbitrators the power to sanction a party that participates in the arbitration in bad faith. [125]

Similarly, in *Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, the Second Circuit confirmed in part an award that sanctioned a party for faulty document production and held that "an arbitrator's determination that a party acted in bad faith is subject to limited review." [126] This case involved a commercial arbitration for a breach of a contract to sell and purchase a petrochemical. The purchaser initiated the arbitration against the seller for breach of contract. [127] The arbitration was to be conducted under the Commercial Arbitration Rules of the AAA. [128] In their initial submissions, both parties requested attorney's fees. During the arbitration proceeding, the arbitrator determined that the purchaser's document production was "patently dilatory and evasive," and at the request of the seller, the arbitrator imposed sanctions on the purchaser and its attorney. [129] The Second Circuit confirmed the award with regards to sanctions imposed on the purchaser on the ground that since the parties had both requested attorney's fees in the initial submissions, the arbitrator was authorized to award attorneys fees. [130] There was thus no violation of FAA 10 (a)(4). However, the Court found that the arbitrator did not have the authority to award sanctions against the attorney herself because she was not a party to the arbitration agreement. [131]

In *First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*, the United States District Court for the Southern District of Florida confirmed an arbitral panel's decision to dismiss with prejudice a case on the ground that the claimant had sent "egregious" letters to clients concerning the respondent. [132] In that case, the Court held that the arbitrators had not exceeded their ***177** power in dismissing this case with prejudice. [133] Indeed, the Court reasoned that, "if arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims." [134]

These cases show that even when they are confronted with a motion to vacate an award based on sanctions allegedly imposed improperly by arbitrators, courts show deference to arbitrators' decisions.

In *MCR of America, Inc. v. Greene*, the Maryland Court of Special Appeals vacated an arbitral award in which the arbitrator had sanctioned the employee and his counsel to pay the employer's attorney's fees in an arbitration between an employee and an employer. [135] The Court held that the arbitrator had exceeded her authority under Maryland's Uniform Arbitration for two reasons. First, the arbitrator exceeded her authority because the parties' agreement did not expressly enable her to award attorney's fees. [136] The Court disregarded the AAA rules applicable to the arbitration that allowed for attorney's fees, and it looked at the Maryland Arbitration Act, which presumed that parties have not agreed to attorney's fees unless expressly stated in the agreement. Second, the Court held that arbitration was a matter of contract and for this reason, since the employee's attorney was not party to the contract, he could not be sanctioned. [137]

While this Maryland decision vacated the award pursuant to FAA 10(a)(4), it does maintain that arbitrators' authority derives from the parties' agreement, and were the parties' agreement clear on the subject of attorney's fees, the award would have been enforced. Informed arbitrators should not shy away from their authority, if it exists in the case, to issue sanctions against a party who is not complying with the arbitrator's orders or who is flagrantly participating in bad faith. Arbitration is intended to be a cost effective and efficient process, and when a party to an arbitration abuses the process, that abuse should not be tolerated by the arbitrators.

***178 VII. CONCLUSION**

Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration. No informed arbitrator should shy away from that responsibility for fear of jeopardizing the award. Be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process, arbitrators have the tools to manage the arbitration process. These tools coupled

with courts' strong support of arbitrators' discretion in this context provide arbitrators with the means to take an active role in controlling the time and cost of arbitration.

Many arbitrators are already using these tools and successfully managing the arbitration process. [138] For those who have been hesitant, fearing that asserting control will create grounds for vacatur, fear not. Inform yourself of the judicially recognized boundaries outlined in this article and step into your rightful role as time and cost controller.

Footnotes

a1 Tracey B. Frisch, Esq. is Senior Counsel at the American Arbitration Association. Ms. Frisch is also an adjunct Professor at Benjamin N. Cardozo School of Law. Special thank you to Alyssa Feliciano and Severine Losembe, AAA Legal Department interns, whose assistance motivated me to complete this article, and to Eric Tuchmann, AAA's General Counsel for his support and guidance in drafting this article. And of course to the editors of the Journal for accepting this article for publication and for helping me to get this article into shape.

1 The median time frame for a civil case to go to trial in federal court is 23.2 months, based on U.S. Federal Court statistics for civil cases for the 12-month period ending March 31, 2011; but the median timeframe for an AAA commercial arbitration to be awarded is 7.3 months, based on AAA commercial arbitrations awarded in 2011. Statistics on file with author.

2 9 U.S.C. §10(a)(3). Section 10(a) of the Federal Arbitration Act lists four grounds for vacating an arbitration award:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

3 Rosenweig v. Morgan Stanley, 494 F.3d 1328 (11th Cir. 2007).

4 *id.* at 1334.

5 Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002).

6 *id.* at 625.

7 *Id.*

8 *See* Bain Cotton Co. v. Chestnut Cotton Co., 531 F.App'x 500 (5th Cir. 2013). In this case, the Circuit Court affirmed the District Court's denial of motion to vacate award on ground arbitrators denied discovery requests. The Court held that "regardless whether the district court or this court -- or both -- might disagree with the arbitrators' handling of [[Plaintiff's] discovery requests, that handling does not rise to the level required for vacating [award] under any of the FAA's narrow and exclusive grounds." *Id.* at 501. *See also* Prestige Ford v. Ford Dealer Comput. Serv., Inc., 324 F.3d 391 (5th Cir. 2003).

9 *Prestige Ford*, 324 F.3d at 391.

10 *id.* at 395.

11 *id.* at 394.

12 *See* LJL 33rd St. Assoc., LLC v. Pitcairn Prop. Inc., 725 F.3d 184 (2d Cir. 2013); *see also* Bangor Gas Co., LLC v. H.Q. Energy Serv. (U.S.) Inc., 695 F.3d 181 (1st Cir. 2012) ("So even if we were to assume [doubtfully] that consideration of these two additional documents was 'misconduct' under the FAA, it could not have been prejudicial, a requirement for vacating an award under §10(a)(3)."); *Rosenweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328 (2007).

13 *LJL 33rd St. Assoc.*, 725 F.3d at 184.

14 *id.* at 194.

15 *id.* at 193.

16 *See* Ardalan v. Macy's Inc., No. 5:09-CV-04894 (JW), 2012 WL 2503972, at *1 (N.D. Cal. Jun. 28, 2012) (determining that even if an arbitrator deliberately excludes evidence because of bias, the plaintiff bears the burden of showing that the exclusion resulted in a fundamentally unfair hearing); A.H. Robins Co., Inc. v. Dalkon Shield, 228 B.R. 587 (Bankr. E.D. Va. 1999); *see also* Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012); Sebbag v. Shearson Lehman Bros., Inc., No. 89-CV-5477 (MJL), 1991 WL 12431 (S.D.N.Y. Jan. 8, 1991) (confirming the arbitral award despite the claimant's argument that they did not get access to files on the grounds that the court must look at the proceedings as whole in determining whether a fair hearing has been given and not look at each evidentiary decision and determine whether the court agrees with them).

17 *A.H. Robins Co., Inc.*, 228 B.R. 587.

18 *Id.* at 592.

19 *Id.*

20 *id.* at 592-93.

21 *Id.* at 592.

22 *See* Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-CV-283 (GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4 2013) (confirming the award and determining that an arbitral panel's decision to deny a party's request for two documents out of sixty does not amount to "misconduct" under the FAA); Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012) (confirming the arbitral award and held that arbitrators are afforded great deference and thus hearing only one witness when the issue was one of contractual interpretation did not make the hearing fundamentally unfair); AT&T Corp v. Tyco, 255 F. Supp. 2d 294 (S.D.N.Y. 2003) (confirming the award on the ground that the arbitration did entail a discovery process including depositions and documents exchange as well as briefing of the issues and evidentiary hearings).

23 *See* Robert Lewis v. William Webb, 473 F.3d 498 (2d Cir. 2007) (confirming the award although the arbitrators had restricted discovery because it did not deprive the claimant of a fundamentally fair arbitration process); Areca, Inc. v. Oppenheimer and Palli Hulton Assoc., 960 F. Supp. 52 (S.D.N.Y. 1997) (confirming the award despite the fact that arbitrators refused to allow investors to present testimony of the brokerage's firm CFO).

24 *Areca, Inc.*, 960 F. Supp. 52.

25 *Id.* at 55.

26 *Id.*

27 *Id.*

28 *See* American State Univ. v. Kiemm, No. B242766, 2013 WL 1793931, at *1 (Cal. Ct. App. Apr. 29, 2013) (confirming award and determining that courts "should focus on whether the exclusion was prejudicial, not whether the evidence was material"); Hicks III v. UBS Fin. Serv., Inc., 226 P.3d 762 (Utah Ct. App. 2010); Carson v. Painewebber, Inc., 62 P.3d 996 (Colo. App. 2002) (confirming the arbitral award because the NASD rules, which the arbitration followed, allowed for the arbitrator's conduct but held that "parties to an arbitration proceeding have an absolute right to be heard and present evidence before the arbitrators, and that a refusal ... is such misconduct as affords a sufficient ground for setting aside the award").

29 *Hicks III*, 226 P.3d at 762.

30 *id.* at 770.

31 *Id.* at 772.

32 *id.* at 771.

33 *Id.* at 772.

34 *Id.* at 762.

35 *See* Int'l Union, United Mine Workers of America v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997); *see also* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

36 *Int'l Union, United Mine Workers of America*, 232 F.3d at 383.

37 *id.* at 389.

38 *Id.* at 388

39 *Id.* at 390. As seen through this case, oftentimes parties will move to vacate based on both 10(a)(3) and 10(a)(4) (FAA 10(a)(4): "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.") grounds arguing that the arbitrator's alleged misdeed under 10(a)(3) resulted in the arbitrator exceeding her powers under 10(a)(4).

40 *Tempo Shain Corp.*, 120 F.3d 16.

41 *id.* at 17.

42 *id.* at 18.

43 *Id.*

44 *id.* at 20.

45 *Tempo Shain Corp.*, 120 F.3d at 21.

46 *See* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

47 *Harvey Aluminum (Inc.)*, 263 F. Supp. at 488.

48 *id.* at 490.

49 *id.* at 491.

50 *id.* at 492.

51 *id.* at 490.

52 *See* Boston Pub. Health Comm'n v. Boston Emergency Med. Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126 (2014); Manchester Twp. Bd. of Educ. v. Carney, Inc., 199 N.J. Super. 266 (1985).

53 *Boston Pub. Health Comm'n*, 10 N.E.3d 670, 2014 WL 2776854.

54 Rule 31 AAA Labor Arbitration Rules as amended and effective July 1, 2005: "[i]f briefs ... are to be filed ... the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA." *Id.* at *2.

55 *Boston Pub. Health Comm'n*, 85 Mass.App.Ct. at *2.

56 *Id.*

57 *See* Alexander Julian Inc. v. Mimco, Inc., 29 F.App'x. 700 (2d Cir. 2002); Metallgesellschaft A.G. v. M/V Captain Constante, 790 F.2d 280 (2d Cir. 1986); *In re* Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995); Sunrise Trust v. Morgan Stanley & Co., No. 2:12-

CV-944 JCM (PAL), 2012 WL 4963766 (D. Nev. Oct. 16, 2012); HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio Sept. 28, 2012); Dealer Comput. Serv. Inc. v. Dale Spradley Motors, Inc., No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

58 *See Alexander Julian Inc.*, 29 F.App'x. 700; Berlacher v. Painewebber, 759 F. Supp. 21 (D.D.C. 1991).

59 *Alexander Julian Inc.*, 29 F. App'x. at 703.

60 *Id.*

61 *Id.*

62 *See* Bisnoff v. King, 154 F. Supp. 2d 630 (S.D.N.Y. 2001); Gordon Capital Corp. v. Jesup, No. 91-CV-3821 (MBM) 1992 WL 41722 (S.D.N.Y. Feb. 20, 1992).

63 *Bisnoff v. King*, 154 F. Supp. 2d at 639.

64 *id.* at 634.

65 *id.* at 638.

66 *id.* at 635.

67 *Bisnoff*, 154 F. Supp. 2d 630.

68 *id.* at 637.

69 *See In re* Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995).

70 *Id.* at 1045.

71 *id.* at 1043.

72 *id.* at 1045.

73 *Id.*

74 *In re Time Constr., Inc.*, 43 F.3d at 1046.

75 *See* HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio, Sept. 28, 2012). *See also* Gwire v. Roulac Grp., 2008 WL 3907403 (Cal. Sup. Ct. 2008) (confirming an award despite the arbitrator having refused to grant a party's request for a "sur-reply brief").

76 *See Alexander Julian Inc.*, 29 Fed.Appx. 700 (2d Cir. 2002); *Dealer Comput. Serv. Inc.*, No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Roche v. Local 32B-32J, 755 F. Supp. 622 (S.D.N.Y. 1991).

77 *Dealer Comput. Services Inc.*, 2012 WL 72284 (confirming the award and holding that the arbitrator acted within the authority granted to him by the AAA rules when he did not grant the party's request for continuance).

78 Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

79 *id.* at *1.

80 *id.* at *1, *7 (citations omitted).

81 *id.* at *7.

82 *Id.*

83 *See* Wedbush Morgan Sec., Inc. v. Brandman, 192 A.D.2d 497 (1st Dep't 1993); Pacilli v. Philips Appel & Walden, Inc., 1991 WL 193507 (E.D. Pa. Sept. 24, 1991); Leblon Consultants, Ltd. v. Jackson China, Inc., 92 A.D.2d 499 (1st Dep't 1983).

84 *See Wedbush Morgan Sec., Inc.*, 192 A.D.2d 497; *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

85 *Wedbush Morgan Sec., Inc.*, 192 A.D.2d 497.

86 *id.* at 497 (citations omitted).

87 *Id.*

88 *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

89 *id.* at 499.

90 *Id.*

91 *Id.*

92 *Pacilli*, 1991 WL 193507.

93 *id.* at *1.

94 *Id.*

95 *id.* at *2.

96 *Id.*

97 *Id.* at *3.

98 *Pacilli*, 1991 WL 193507 at *3.

99 *id.* at *6.

100 Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

101 *id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.*

105 Warren v. Tacher, 114 F. Supp. 2d 600 (W.D. Ky. 2000)

106 *id.* at 602.

107 *See* Altreus Cmty. Grp. of Arizona v. Stardust Dev., Inc., 229 Ariz. 503 (Ct. App. 2012) (confirming the award and holding that arbitrators have an implicit power to award summary judgment based on Rule 45 of the AAA Rules); Pegasus Const. Corp. v. Turner Constr. Co., 84 Wash.App. 744 (Ct. App. 1997); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (App. Ct. 1995).

108 *Pegasus Const. Corp.*, 84 Wash. App. 744.

109 *id.* at 747.

110 *id.* at 750.

111 *Schlessinger*, 40 Cal. App. 4th 1096.

112 *id.* at 1100-01.

113 *Id.*

114 *id.* at 1101.

115 *id.* at 1101-02.

116 *Id.* at 1103.

117 *Schlessinger*, 40 Cal. App. 4th 1096 at 1111. New AAA rules do expressly allow for dispositive motions.

118 *Id.*

119 However, despite this deferential review of arbitrators' summary adjudications, at least one state court has vacated an arbitration award when an arbitrator granted a motion to dismiss based on a statute of limitations defense. In *Andrew v. Cuna Brokerage Services, Inc.*, the court vacated a National Association of Securities Dealers arbitration award on the ground that the arbitrator should not have dismissed a valid claim on the basis of a statute of limitations as it denied the parties a full and fair hearing. *See* Andrew v. Cuna Brokerage Serv., Inc., 976 A.2d 496 (Pa. Super. Ct. 2009).

120 *See also* JAMS Arbitration Rules, effective July 1, 2014, Rule 18. Summary Disposition of a Claim or Issue: "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

121 *See* Reliastar Life Ins. Co. v. EMC National Life Co., 564 F.3d 81 (2d Cir. 2009); Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340 (2d Cir. 2005).

122 *Reliastar Life Ins. Co.*, 564 F.3d 81.

123 *id.* at 85.

124 *Id.*

125 *id.* at 86.

126 *Interchem Asia 2000 Pte. Ltd.*, 373 F. Supp. 2d at 355.

127 *id.* at 343.

128 *Id.*

129 *id.* at 344.

130 *id.* at 354.

131 *Id.* at 359; *see also* Seagate Tech., LLC v. Western Dig. Corp., No. A12-1944, 2014 WL 5012807 (Minn. Sup. Ct. Oct. 8, 2014) (confirming an award and holding that the arbitrator did not exceed his authority by imposing punitive sanctions after the arbitrator determined a party fabricated evidence because sanctions were authorized by the AAA Employment rule).

132 First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co., 939 F. Supp. 1559 (S.D. Fla. 1996); *see also* Prime Associates Group, LLC. v. Nama Holdings, LLC., 2012 WL 2309055 (Cal. Ct. App. June 19, 2012) (confirming an arbitral award which sanctioned a party for discovery misconduct and holding that arbitrators did not exceed their powers in sanctioning that party).

133 *First Preservation Capital, Inc.*, 939 F. Supp. at 1566-67.

134 *id.* at 1565.

135 MCR of America, Inc. v. Greene, 148 Md. App. 91 (Md. Ct. Spec. App. 2002).

136 *id.* at 103.

137 *id.* at 111.

138 The AAA looked at 4,400 cases administered by the AA concluded in 2009 through 2011, across five important U.S. business sectors and found that some large complex cases (exceeded $500,000 in claims) were awarded in five months of less. On file with author.

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